

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

KEVIN STACY,

Plaintiff,

v.

CAROLYN W. COLVIN,  
Commissioner of Social Security,

Defendant.

No. 1:14-CV-03043-JTR

ORDER GRANTING PLAINTIFF'S  
MOTION FOR SUMMARY  
JUDGMENT

**BEFORE THE COURT** are cross-Motions for Summary Judgment. ECF No. 13, 15. Attorney D. James Tree represents Kevin Stacy (Plaintiff); Special Assistant United States Attorney Daphne Banay represents the Commissioner of Social Security (Defendant). The parties have consented to proceed before a magistrate judge. ECF No. 22. After reviewing the administrative record and briefs filed by the parties, the Court **GRANTS, in part,** Plaintiff's Motion for Summary Judgment; **DENIES** Defendant's Motion for Summary Judgment; and **REMANDS** the matter to the Commissioner for additional proceedings pursuant to 42 U.S.C. § 405(g).

**JURISDICTION**

Plaintiff filed applications for Supplemental Security Income (SSI) and Disability Insurance Benefits (DIB) on April 18, 2011, alleging disability since December 23, 1999, due to back pain, left rotator cuff injury, and two discs

1 removed from his back. Tr. 269. The applications were denied initially and upon  
2 reconsideration. Tr. 127-142, 145-156. Administrative Law Judge (ALJ) Virginia  
3 Robinson held a hearing on September 14, 2012, Tr. 34-66, at which Plaintiff,  
4 represented by counsel, and vocational expert (VE) Scott Whitmer testified. At the  
5 September 14, 2012, hearing, Plaintiff amended his onset date to July 15, 2010.  
6 Tr. 38. The ALJ issued a decision on November 30, 2012, dismissing the DIB  
7 application and denying the SSI application. Tr. 18-33. The Appeals Council  
8 denied review on February 5, 2014. Tr. 1-7. The ALJ's November 30, 2012,  
9 decision denying the SSI benefits became the final decision of the Commissioner,  
10 which is appealable to the district court pursuant to 42 U.S.C. § 405(g). Plaintiff  
11 filed this action for judicial review on April 3, 2014. ECF No. 1, 3. Both Plaintiff  
12 and Defendant agree that the application for SSI benefits is the sole application  
13 before the Court. ECF No. 13 at 2; ECF No. 15 at 1-3.

#### 14 **STATEMENT OF FACTS**

15 The facts of the case are set forth in the administrative hearing transcript, the  
16 ALJ's decision, and the briefs of the parties. They are only briefly summarized  
17 here.

18 Plaintiff was born on March 3, 1962, and was 48 years old at the amended  
19 alleged onset date, July 15, 2010. Tr. 204. Plaintiff completed high school in 1981  
20 and has past work as a carpenter and general laborer. Tr. 39, 57, 270.

21 The evidence in the record pertaining to the relevant time period is sparse,  
22 consisting of only one urgent-care visit not related to the alleged impairments, one  
23 examination by Jeffrey R. Merrill, M.D., and one MRI of the lumbar spine. Tr.  
24 674-681, 694-695, 700-703. The opinion evidence is limited to a Department of  
25 Social and Health Services Functional Assessment form completed by Dr. Merrill  
26 limiting Plaintiff to less than a full range of sedentary work and the opinions of the  
27 state agency medical consultants limiting Plaintiff to less than a full range of light  
28 work. Tr. 69-81, 100-122, 696-697.

1 At the administrative hearing, Plaintiff described being unable to work due  
2 to back pain and left shoulder rotator cuff injury. Tr. 41. Plaintiff testified that he  
3 could lift 20 pounds but would “pay for it later” and that he could “try and do it”  
4 for two hours but could hurt his back by “just picking it up one time.” Tr. 41, 47-  
5 48. He testified that since the amended date of onset, he has been doing jobs for  
6 family and friends, including painting, weed pulling, and fixing fences, but he  
7 would unexpectedly leave early or not show up at the scheduled times for these  
8 jobs on an average of four or five times out of ten due to back pain. Tr. 40, 49.

### 9 STANDARD OF REVIEW

10 The ALJ is responsible for determining credibility, resolving conflicts in  
11 medical testimony, and resolving ambiguities. *Andrews v. Shalala*, 53 F.3d 1035,  
12 1039 (9th Cir. 1995). The Court reviews the ALJ’s determinations of law de novo,  
13 deferring to a reasonable interpretation of the statutes. *McNatt v. Apfel*, 201 F.3d  
14 1084, 1087 (9th Cir. 2000). The decision of the ALJ may be reversed only if it is  
15 not supported by substantial evidence or if it is based on legal error. *Tackett v.*  
16 *Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999). Substantial evidence is defined as  
17 being more than a mere scintilla, but less than a preponderance. *Id.* at 1098. Put  
18 another way, substantial evidence is such relevant evidence as a reasonable mind  
19 might accept as adequate to support a conclusion. *Richardson v. Perales*, 402  
20 U.S. 389, 401 (1971). In determining whether the ALJ’s decision is supported by  
21 substantial evidence, the administrative record must be reviewed as a whole,  
22 weighing both the evidence that supports and the evidence that detracts from the  
23 ALJ’s conclusion. *Mangallanes v. Brown*, 881 F.2d 747, 750 (9th Cir. 1989). If  
24 the evidence is susceptible to more than one rational interpretation, the court may  
25 not substitute its judgment for that of the ALJ. *Tackett*, 180 F.3d at 1098.  
26 Nevertheless, a decision supported by substantial evidence will still be set aside if  
27 the proper legal standards were not applied in weighing the evidence and making  
28 the decision. *Browner v. Secretary of Health and Human Services*, 839 F.2d 432,

433 (9th Cir. 1988). If substantial evidence supports the administrative findings, or if conflicting evidence supports a finding of either disability or non-disability, the ALJ's determination is conclusive. *Sprague v. Bowen*, 812 F.2d 1226, 1229-1230 (9th Cir. 1987).

### SEQUENTIAL EVALUATION PROCESS

The Commissioner has established a five-step sequential evaluation process for determining whether a person is disabled. 20 C.F.R. § 416.920(a); *see Bowen v. Yuckert*, 482 U.S. 137, 140-142 (1987). In steps one through four, the burden of proof rests upon claimants to establish a prima facie case of entitlement to disability benefits. *Tackett*, 180 F.3d at 1098-1099. This burden is met once claimants establish that physical or mental impairments prevent them from engaging in their previous occupations. 20 C.F.R. § 416.920(a)(4). If claimants cannot do their past relevant work, the ALJ proceeds to step five, and the burden shifts to the Commissioner to show that (1) the claimants can make an adjustment to other work, and (2) specific jobs exist in the national economy which claimants can perform. *Batson v. Comm'r of Soc. Sec. Admin.*, 359 F.3d 1190, 1193-1194 (2004). If claimants cannot make an adjustment to other work in the national economy, a finding of "disabled" is made. 20 C.F.R. § 416.920(a)(4)(v).

### ADMINISTRATIVE DECISION

On November 30, 2012, the ALJ issued a decision finding Plaintiff was not disabled as defined in the Social Security Act. Tr. 18-33.

At step one, the ALJ found Plaintiff had not engaged in substantial gainful activity since July 15, 2010, the amended date of onset. Tr. 24.

At step two, the ALJ determined Plaintiff had the following severe impairments: degenerative disc disease and left rotator cuff impingement, status-post left shoulder surgery in May 2000. Tr. 24.

At step three, the ALJ found Plaintiff did not have an impairment or combination of impairments that met or medically equaled the severity of one of

1 the listed impairments. Tr. 24.

2 At step four, the ALJ assessed Plaintiff's residual function capacity (RFC)  
3 and determined he could perform light exertional level with the following  
4 restrictions:

5  
6 The claimant can frequently climb ramps or stairs, but never climb  
7 ladders, ropes, or scaffolds. He can occasionally stoop and crawl. He  
8 can frequently crouch. Reaching or handling is unlimited in the right  
9 upper extremity. He can occasionally reach overhead with the left  
10 upper extremity. He can otherwise reach frequently in all other  
11 directions with the left upper extremity. He can also frequently handle  
12 with the left upper extremity. He should avoid concentrated exposure  
to extreme cold, excessive vibrations, and workplace hazards such as  
dangerous machinery and unprotected heights.

13 Tr. 24. The ALJ concluded that Plaintiff was not able to perform his past relevant  
14 work. Tr. 27.

15 At step five, the ALJ determined that, considering Plaintiff's age, education,  
16 work experience and RFC, and based on the testimony of the vocational expert,  
17 there were other jobs that exist in significant numbers in the national economy  
18 Plaintiff could perform, including the jobs of cashier II, scale operator, and laundry  
19 sorter. Tr. 28. The ALJ thus concluded Plaintiff was not under a disability within  
20 the meaning of the Social Security Act at any time from July 15, 2010, through the  
21 date of the ALJ's decision, November 30, 2012. Tr. 28.

## 22 ISSUES

23 The question presented is whether substantial evidence supports the ALJ's  
24 decision denying benefits and, if so, whether that decision is based on proper legal  
25 standards. Plaintiff contends the ALJ erred by (1) failing to properly consider  
26 Plaintiff's testimony about the severity of his symptoms; (2) failing to properly  
27 consider medical opinion evidence regarding Plaintiff's functional limitations; and  
28 (3) failing to fully and fairly develop the record.

## DISCUSSION

### A. Credibility

Plaintiff contends the ALJ's erred by improperly discrediting his symptom claims. ECF No. 13 at 15. The Court agrees.

It is generally the province of the ALJ to make credibility determinations, *Andrews*, 53 F.3d at 1039, but the ALJ's findings must be supported by specific cogent reasons, *Rashad v. Sullivan*, 903 F.2d 1229, 1231 (9th Cir. 1990). Absent affirmative evidence of malingering, the ALJ's reasons for rejecting the claimant's testimony must be "specific, clear and convincing." *Smolen v. Chater*, 80 F.3d 1273, 1281 (9th Cir. 1996); *Lester v. Chater*, 81 F.3d 821, 834 (9th Cir. 1995). "General findings are insufficient: rather the ALJ must identify what testimony is not credible and what evidence undermines the claimant's complaints." *Lester*, 81 F.3d at 834.

The ALJ found Plaintiff not fully credible concerning the intensity, persistence, and limiting effects of his symptoms. Tr. 25. The ALJ reasoned that Plaintiff was less than credible because his symptom reporting was (1) contrary to the medical evidence; (2) undermined by his lack of treatment; and (3) contrary to his activities of daily living (ADL). Tr. 25-26.

#### 1. Contrary to the objective medical evidence

The ALJ noted that Plaintiff's allegations of back pain were not supported by the July 2010 MRI or evaluation, specifically noting that the MRI revealed generally mild to moderate degenerative changes and that Dr. Merrill's examination resulted in "modest" findings. Tr. 25.

An ALJ may cite inconsistencies between a claimant's testimony and the objective medical evidence in discounting the claimant's testimony. *Bray v. Comm'r of Soc. Sec. Admin.*, 554 F.3d 1219, 1227 (9th Cir. 2009). But, the ALJ may not discredit the claimant's testimony as to subjective symptoms merely because they are unsupported by objective evidence. *Lester*, 81 F.3d at 834.

1        Considering the other two reasons the ALJ gave in support of her credibility  
2 determination are not clear and convincing, as discussed below, the ALJ's  
3 determination that Plaintiff's symptom statements are contrary to objective medical  
4 evidence is insufficient to find the claimant less than fully credible.

## 5        **2.        Lack of Treatment**

6        In assessing a claimant's credibility, an ALJ can rely upon "'unexplained or  
7 inadequately explained failure to seek treatment or to follow a prescribed course of  
8 treatment.'" *Tommasetti v. Astrue*, 533 F.3d 1035, 1039 (9th Cir. 2008) (quoting  
9 *Smolen*, 80 F.3d at 1284); *see Orn v. Astrue*, 495 F.3d 625, 638 (9th Cir. 2007) (an  
10 "unexplained, or inadequately explained, failure to seek treatment may be the basis  
11 for an adverse credibility finding unless one of a 'number of good reasons for not  
12 doing so' applies"). A claimant's statements may be deemed less credible "if the  
13 level or frequency of treatment is inconsistent with the level of complaints, or if the  
14 medical reports or records show that the individual is not following the treatment  
15 as prescribed and there are no good reasons for this failure." S.S.R. 96-7p.

16        However, a claimant's failure to follow a course of treatment may be  
17 excused if the claimant cannot afford the treatment. *Gamble v. Chater*, 68 F.3d  
18 319, 321-322 (9th Cir. 1995) ("Disability benefits may not be denied because of  
19 the claimant's failure to obtain treatment he cannot obtain for lack of funds. . . . It  
20 flies in the face of the patent purposes of the Social Security Act to deny benefits  
21 to someone because he is too poor to obtain medical treatment that may help him."  
22 (citation omitted)).

23        Plaintiff asserts that he was not able to afford medical treatment in this case.  
24 Tr. 51-52. The ALJ concludes this explanation to be "unpersuasive," for three  
25 reasons (1) the claimant managed to fund his cigarette habit; (2) he has not  
26 explored options such as charity care; and (3) Plaintiff received some income from  
27 working for family and friends. Tr. 25-26. None of these assertions are supported  
28 by the record. The record is void of any discussion regarding how Plaintiff paid



1 for cigarettes and whether he considered or pursued charity care. Instead, the  
2 record shows Plaintiff applied for General Assistance through the Department of  
3 Social and Health Services showing that he did seek alternative ways to pay for  
4 medical care. Tr. 670-671. Additionally, the money earned from working for  
5 family and friends is minimal. Plaintiff testified that it amounted to thirty to forty  
6 dollars every two to three days. Tr. 39.

7 Therefore, the ALJ's second reason for finding Plaintiff less than fully  
8 credible is not supported by the record and does not qualify as "specific, clear and  
9 convincing."

### 10 **3. ADLs**

11 The ALJ's third reason for finding Plaintiff less than fully credible, that  
12 Plaintiff's activities cast doubt on his alleged limitations, Tr. 26, is additionally not  
13 a "specific, clear, and convincing" reason to undermine Plaintiff's credibility.

14 A claimant's daily activities may support an adverse credibility finding if (1)  
15 the claimant's activities contradict his other testimony, or (2) "the claimant is able  
16 to spend a substantial part of his day engaged in pursuits involving performance of  
17 physical functions that are transferable to a work setting." *Orn* 495 F.3d at 639  
18 (citing *Fair v. Bowen*, 885 F.2d 597, 603 (9th Cir. 1989)). "The ALJ must make  
19 'specific findings relating to [the daily] activities' and their transferability to  
20 conclude that a claimant's daily activities warrant an adverse credibility  
21 determination." *Id.* (quoting *Burch v. Barnhart*, 400 F.3d 676, 681 (9th Cir.  
22 2005)). A claimant need not be "utterly incapacitated" to be eligible for benefits.  
23 *Fair*, 885 F.2d at 603.

24 The ALJ did not conclude that Plaintiff's activities contradicted his other  
25 testimony, instead, she noted that Plaintiff reported being able to do odd jobs for  
26 family and friends for about 15 hours per week, including raking leaves, painting,  
27 doing maintenance work, pulling weeds, and fixing fences, and agreed that  
28 Plaintiff could not sustain such activities throughout a workday. Tr. 26. But, just



commenting on the existence of such activities, is not sufficient for an adverse credibility determination. The ALJ must make specific findings relating the activities and their transferability, which was not done here.

#### **4. Conclusion**

In conclusion, the ALJ erred by failing to provide “specific, clear, and convincing” reasons to find Plaintiff less than fully credible in his symptom reporting. Accordingly, the Court finds this matter must be remanded for additional proceedings for the ALJ to properly assess Plaintiff’s credibility. Upon remand, the ALJ should consider the record as a whole and limit her rationale to the evidence in the record.

#### **B. State agency examiner, Alnoor Virji, M.D.**

Plaintiff asserts that the opinion of Dr. Virji is unreliable and not supported by the record. ECF No. 13 at 19. The Court agrees.

The records for the relevant period of time contain only the opinions of Dr. Merrill and the state agency medical consultants. The ALJ gave “greater weight” to the opinion of one state agency medical consultant, Dr. Virji, over the opinion of Dr. Merrill. Tr. 26-27. In forming his opinion, Dr. Virji reviewed Dr. Merrill’s opinion and the “MISC ME” opinion dated June 11, 2011. Tr. 115. There is no 2011 ME opinion in the record. Plaintiff asserts that Dr. Virji actually reviewed an opinion given 10 years earlier by Dr. McLaughlin and mistakenly formed his opinion on the belief that Dr. McLaughlin’s opinion, limiting Plaintiff to medium work, was performed during the relevant time period. ECF No. 13 at 17.

Defendant appears to agree that Dr. McLaughlin’s 2001 opinion was mistaken as a 2011 opinion by Dr. Virji, but asserts that Dr. Virji did not base his opinion on the 2001 opinion of Dr. McLaughlin. Defendant contends that Dr. Virji gave Dr. McLaughlin’s opinion little weight and, instead, Dr. Virji based his opinion on the specific evidence in the record. ECF No. 15 at 10-11.

A nonexamining physician’s opinion, with nothing more, does not constitute

1 substantial evidence, particularly in view of the conflicting observations, opinions,  
2 and conclusions of an examining physician. *Lester*, 81 F3d at 831 (citing *Pitzer v.*  
3 *Sullivan*, 908 F.2d 502, 506 n.4 (9th Cir. 1990); *Gallant v. Heckler*, 753 F.2d 1450,  
4 1456 (9th Cir. 1984)). In *Gallant*, the Court held that “the report of [a] non-  
5 treating, non-examining physician, combined with the ALJ’s own observance of  
6 [the] claimant’s demeanor at the hearing” did not constitute “substantial evidence”  
7 and, therefore, did not support the Commissioner's decision to reject the examining  
8 physician’s opinion that the claimant was disabled. 753 F.2d at 1456. The opinion  
9 of a nonexamining physician may serve as substantial evidence only when it is  
10 supported by other evidence in the record and is consistent with it. *Andrews*, 53  
11 F.3d at 104.

12 In her review of medical opinions, the ALJ gave Dr. Virji’s opinion “greater  
13 weight” over that of the treating physician, because his opinion “more accurately  
14 reflects the overall medical evidence and the claimant’s activities.” Tr. 27. The  
15 ALJ then went on to cite the evidence in the record that was not consistent with Dr.  
16 Virji’s opinion:

17 While I agree with Dr. Virji’s opinion that the claimant is limited to  
18 occasional overhead reaching with the left arm, I find that the claimant  
19 retains the ability to reach frequently in all other directions. I note that,  
20 when examined in July 2010, he had only mild loss of motion on  
21 internal rotation, and the empty can and arc maneuver tests were  
negative (7F9).

22 Tr. 27. Without reference to other evidence in the record supporting Dr. Virji’s  
23 opinion, it is not substantial evidence. Furthermore, the ambiguity presented by  
24 the misrepresentation of the record in his opinion supports the conclusion that Dr.  
25 Virji’s opinion may not be reliable and is therefore not relevant evidence as a  
26 reasonable mind might accept as adequate to support a conclusion.

27 **C. Jeffrey R. Merrill, M.D.**

28 Plaintiff argues the ALJ failed to properly consider and weigh the medical

1 opinion expressed by Dr. Merrill. ECF No. 13 at 9-12.

2 The ALJ gave Dr. Merrill's opinion "little weight" for three reasons: (1) it  
3 was inconsistent with Plaintiff's report that he could lift 20 pounds "without any  
4 problems"; (2) it was not supported by the physical examination; and (3) it was not  
5 consistent with Plaintiff's activities. Tr. 26-27.

6 In weighing medical source opinions, the ALJ should distinguish between  
7 three different types of physicians: (1) treating physicians, who actually treat the  
8 claimant; (2) examining physicians, who examine but do not treat the claimant;  
9 and, (3) nonexamining physicians who neither treat nor examine the claimant.  
10 *Lester*, 81 F.3d at 830. The ALJ should give more weight to the opinion of a  
11 treating physician than to the opinion of an examining physician. *Orn*, 495 F.3d at  
12 631. The ALJ should give more weight to the opinion of an examining physician  
13 than to the opinion of a nonexamining physician. *Id.* When a treating physician's  
14 opinion is not contradicted by another physician, the ALJ may reject the opinion  
15 only for "clear and convincing" reasons. *Baxter v. Sullivan*, 923 F.2d 1391, 1396  
16 (9th Cir. 1991). When a treating physician's opinion is contradicted by another  
17 physician, the ALJ is only required to provide "specific and legitimate reasons" for  
18 rejecting the opinion of the treating physician. *Murray v. Heckler*, 722 F.2d 499,  
19 502 (9th Cir. 1983). Likewise, when an examining physician's opinion is not  
20 contradicted by another physician, the ALJ may reject the opinion only for "clear  
21 and convincing" reasons. *Lester*, 81 F.2d at 830. When an examining physician's  
22 opinion is contradicted by another physician, the ALJ is only required to provide  
23 "specific and legitimate reasons" for rejecting the opinion of the examining  
24 physician. *Id.* at 830-831.

25 Here, Plaintiff alleges that Dr. Merrill is a treating physician and Defendant  
26 does not contest this assertion. ECF No. 13 at 5, 8-9; ECF No. 15 at 3, 5-7. The  
27 Court views Dr. Merrill as an examining physician as he only evaluated Plaintiff  
28 once for the purposes of a GAU evaluation. Tr. 700.

1 Plaintiff asserts that the ALJ is required to provide clear and convincing  
2 reasons, and Defendant maintains that only specific and legitimate reasons are  
3 required. ECF No. 13 at 9; ECF No. 15 at 5. As set forth above, Dr. Virji's  
4 opinion is not substantial evidence. Therefore, Dr. Merrill's opinion is not  
5 contradicted and the "clear and convincing" standard applies.

6 First, in reviewing the record as a whole, the assertions made by Plaintiff  
7 regarding his ability to lift 20 pounds is not consistent with the definition of light  
8 work set forth in 20 C.F.R. § 416.967(b). While Plaintiff states that he can lift 20  
9 pounds "without any problems," Tr. 295, Plaintiff later testified that he may be  
10 able to lift 20 pounds but he would "pay for it later" and that he could "try and do  
11 it" for two hours but that "just picking it up one time" could hurt his back. Tr. 47-  
12 48. While these statements may appear contradictory, the ALJ does not focus on  
13 the contradictory nature between Plaintiff's statement on a Function Report and  
14 Plaintiff's testimony. Instead, she grasps a single statement made by Plaintiff to  
15 discount the opinion of the treating physician. Considering the evidence as a  
16 whole, this single statement does not reflect the totality of Plaintiff's statement  
17 regarding his ability to lift 20 pounds and therefore is not a "clear and convincing"  
18 reason to reject Dr. Merrill's opinion.

19 The ALJ's second reason for rejecting Dr. Merrill's opinion, that it was not  
20 supported by the physical examination or the lumbar spine MRI, meets the "clear  
21 and convincing" standard. Dr. Merrill was the only person to examine Plaintiff  
22 during the relevant time period aside from an unrelated urgent-care visit. Dr.  
23 Merrill performed a physical evaluation on Plaintiff on July 12, 2010, concluding  
24 that "his findings on physical exam are modest." Tr. 702. After receiving the  
25 results of the MRI performed on July 16, 2010, Dr. Merrill opined that Plaintiff  
26 was limited to less than a full range of sedentary work. Tr. 696-697. The ALJ  
27 accurately set forth the findings from the examination and the MRI which appear  
28 inconsistent with the opinion of Dr. Merrill. A doctor's recorded observations and

1 opinions that are contradictory is a clear and convincing reason to reject that  
2 doctor's opinion. *Bayliss v. Barnhart*, 427 F.3d 1211, 1216 (9th Cir. 2005).

3 Plaintiff contends that the ALJ misunderstood the objective evidence and  
4 misinterpreted the MRI results and that the moderate and marked findings on the  
5 MRI are sufficient evidence to support Dr. Merrill's opinion. ECF 18 at 5-6. If the  
6 evidence is susceptible to more than one rational interpretation, the court may not  
7 substitute its judgment for that of the ALJ. *Tackett*, 180 F.3d at 1098. Because the  
8 single examination and MRI result in evidence is open to multiple interpretations,  
9 this Court may not disturb the ALJ's determination. As such, the ALJ's second  
10 reason for rejecting Dr. Merrill's opinion meets the "clear and convincing"  
11 standard.

12 The ALJ's final reason for rejecting Dr. Merrill's opinion, that Plaintiff's  
13 testimony about working odd jobs for friends and family was inconsistent with the  
14 opinion is not a "clear and convincing" reason. In discussing Plaintiff's  
15 performance of these odd jobs, the ALJ states "I agree with the claimant that he  
16 likely cannot sustain such tasks throughout a workday." Tr. 26. As addressed  
17 above, the ALJ failed to make specific findings relating these activities and their  
18 transferability to work at any exertional level. Therefore, this testimony cannot be  
19 used to discredit the opinion that Plaintiff is limited to sedentary work.

20 In conclusion, only one of the three reasons the ALJ provided for rejecting  
21 Dr. Merrill's opinion meetings the "clear and convincing" standard required. Since  
22 this case is being remanded, the ALJ is directed to reconsider Dr. Merrill's opinion  
23 in light of a new credibility determination and the finding that Dr. Virji's opinion is  
24 not substantial evidence.

25 **D. Develop the record.**

26 Plaintiff asserts that because Dr. Virji's opinion cannot be relied upon as  
27 substantial evidence and because the ALJ rejected the opinion of Dr. Merrill, then  
28 the ALJ's determination is not supported by substantial evidence and additional

1 development of the record is necessary. ECF No. 13 at 20.

2 The ALJ has “a special duty to fully and fairly develop the record and to  
3 assure that the claimant’s interests are considered.” *Smolen*, 80 F.3d at 1288. This  
4 duty exists even when the claimant is represented by counsel. *Brown v. Heckler*,  
5 713 F.2d 441, 443 (9th Cir. 1983). Despite this duty to develop the record, it  
6 remains the claimant’s burden to prove that he is disabled. 42 U.S.C. §  
7 423(d)(5)(A); 20 C.F.R. § 416.912(a). “An ALJ’s duty to develop the record . . .  
8 is triggered only when there is ambiguous evidence or when the record is  
9 inadequate to allow for proper evaluation of the evidence.” *Mayes v. Massanari*,  
10 276 F.3d 453, 459-460 (9th Cir. 2001). “One of the means available to an ALJ to  
11 supplement an inadequate medical record is to order a consultative examination.”  
12 *Reed v. Massanari*, 270 F.3d 838, 841 (9th Cir. 2001).

13 Considering that the opinion of Dr. Virji cannot be relied upon as substantial  
14 evidence and the ALJ rejected the opinion of Dr. Merrill, this matter must be  
15 remanded for additional proceedings. Upon remand the ALJ is directed to send  
16 Plaintiff out for a consultative physical examination to further develop the record.

### 17 **REMEDY**

18 Plaintiff argues the ALJ’s decision should be reversed and remanded for an  
19 immediate award of benefits. ECF No. 13 at 21-22. The decision whether to  
20 remand for further proceedings or reverse and award benefits is within the  
21 discretion of the district court. *McAllister v. Sullivan*, 888 F.2d 599, 603 (9th Cir.  
22 1989). The Court may award benefits if the record is fully developed and further  
23 administrative proceedings would serve no useful purpose. *Smolen*, 80 F.3d at  
24 1292. Remand for additional proceedings is appropriate when additional  
25 proceedings could remedy defects. *Rodriguez v. Bowen*, 876 F.2d 759, 763 (9th  
26 Cir. 1989). In this case, it is not clear from the record that the ALJ would be  
27 required to find Plaintiff disabled if the record was fully developed and all the  
28 evidence were properly evaluated. Further proceedings are necessary for a proper



determination to be made.

On remand, the ALJ shall redetermine Plaintiff's credibility regarding his symptom reporting, and reassess Plaintiff's RFC, taking into considering the opinion of Dr. Merrill and all other medical evidence of record relevant to Plaintiff's claim for disability benefits. The ALJ is directed to further develop the record by requiring Plaintiff to undergo new consultative physical examination prior to a new administrative hearing and, if warranted, by eliciting medical expert testimony to assist the ALJ in formulating a new RFC determination. The ALJ is also directed to obtain testimony from a vocational expert and take into consideration any other evidence or testimony relevant to Plaintiff's disability claim.

### CONCLUSION

Accordingly, **IT IS ORDERED:**

1. Defendant's Motion for Summary Judgment, **ECF No. 15**, is **DENIED**.

2. Plaintiff's Motion for Summary Judgment, **ECF No. 13**, is **GRANTED, in part**, and the matter is **REMANDED** to the Commissioner for additional proceedings consistent with this Order.

3. Application for attorney fees may be filed by separate motion.

The District Court Executive is directed to file this Order and provide a copy to counsel for Plaintiff and Defendant. **Judgment shall be entered for Plaintiff** and the file shall be **CLOSED**.

DATED November 12, 2015.



A handwritten signature in black ink, appearing to read "J. Rodgers", written over a horizontal line.

JOHN T. RODGERS  
UNITED STATES MAGISTRATE JUDGE